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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMIE WILLIAM SORIA,

Defendant and Appellant.

F053328

(Super. Ct. No. F04906967-5)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. W. Kent Levis, Judge.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Leslie W. Westmoreland, Deputy Attorneys General, for Plaintiff and Respondent.

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This is an appeal from a final judgment entered after a jury found defendant Jamie William Soria guilty of all charges against him. Defendant contends the trial court erred in admitting evidence found on two computers, in permitting cross-examination and rebuttal evidence concerning an uncharged crime, and in failing to properly instruct the jury concerning evidence of uncharged conduct. We will conclude the testimony and the computer evidence were relevant and admissible; we will also conclude the court did not abuse its discretion under Evidence Code section 352 in admitting the evidence. Further, we will conclude the trial court had no sua sponte duty to give an uncharged conduct instruction and counsel's failure to request the instruction did not deprive defendant of his right to constitutionally effective assistance of counsel. Accordingly, we will affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Defendant was charged by amended information with sexually molesting a series of prepubescent and early-teen-aged boys. One victim, J.P., testified that over a period of about two years defendant engaged in a series of acts on the victim, including fondling, masturbation, oral copulation, and digital penetration, while the victim pretended to sleep. These acts were the basis for counts 1 (continuous sexual abuse in violation of Pen. Code, § 288.5) and counts 2 and 3 (lewd act upon a child in violation of Pen. Code, § 288, subdivision (a)).

A second victim, K.G., testified that defendant touched and rubbed the victim's penis on one occasion. This instance was the basis for count 4, violation of Penal Code section 288, subdivision (a).

A third victim, E.W., testified that defendant fondled the victim's penis on numerous occasions, attempted to sodomize the victim, and caused the victim to sodomize defendant multiple times. These acts were the basis for counts 5 and 6, violations of Penal Code section 288, subdivision (a), and count 7, violation of Penal Code section 288.5.

A fourth victim, N.E., testified that defendant touched him over his clothing on two occasions, the basis for counts 8 and 9. Count 8 charged a violation of Penal Code section 288, subdivision (a) and count 9 charged defendant had annoyed and molested a child, a misdemeanor violation of Penal Code section 647.6.

Additional facts concerning the trial will be stated as we discuss the issues presented.

The jury found defendant guilty on all counts and found true certain enhancement allegations. The court sentenced defendant to an aggregate determinate term of 18 years in prison and a consecutive indeterminate term of 45 years to life.

DISCUSSION

A. The Computer Evidence

1. *Additional Facts*

Defendant lived with and then was married to the mother of victim K.G. The family had a desktop computer. In addition, defendant had a laptop computer. The police seized both and subjected them to examination by a forensic computer expert. The expert testified extensively concerning the content found on the computers' hard drives, and he was the vehicle for introduction into evidence of numerous images recovered from the computers.

The exhibits consisted of both pornographic and nonpornographic photographs, sexually explicit chat room conversations in which someone using defendant's screen name pretended to be a young boy, and various records of visits to websites and chat rooms that focused on sex with overweight prepubescent boys.

In response to defense counsel's in limine motions, the court restricted the number of exhibits that could be presented. The expert testified more generally that there were dozens and hundreds more of the various types of items on the computers.

Through cross-examination and affirmative evidence, defendant attempted to show that he was not the user who had caused the materials in question to appear on the hard drives.

2. *Defendant's Contentions*

Defendant constructs a multifaceted argument that the wide variety of evidence generated from the computers should not have been admitted against him. Defendant argues on three levels.

First, in various ways, he argues that evidence of his sexual interest in prepubescent boys is *irrelevant*, and therefore inadmissible under either Evidence Code section 1101, subdivision (b) or Evidence Code section 1108. (All further statutory references are to this code.) In one iteration of this argument, defendant's opening brief states: "Possession and distribution of child pornography[,] while evidencing a prurient sexual interest, does not, without more, equate to, or demonstrate, actual molestation or a propensity to molest." Similarly, defendant argues: "Possession of photographs of young boys and Internet chatter about sexual acts with young boys … does not equate or tend to prove appellant harbored the specific intent to commit the charged molestations." In a summary of this level of the argument, defendant states: "[W]hether appellant was or is a pedophile was irrelevant for purposes of trial. Pedophilia is not a prerequisite to commission of sexual offenses, is not an element of sexual molestation offenses, and is not a matter for jury consideration in sexual offense trials outside the confines of the Sexually Violent Predator milieu."

On a second level, defendant contends that, even if it were conceded child pornography evidence was probative of a propensity to molest children and was generally admissible under section 1108, the computer evidence "taken as a whole" was at most admissible to show intent. However, he argues, the charged acts were so clearly sexual in nature that further evidence of intent should have been excluded as prejudicially

cumulative under section 352, in accordance with *People v. Ewoldt* (1994) 7 Cal.4th 380, 406.

On the third level, defendant argues that the amount of computer evidence constituted prejudicial "overkill" and "subjected appellant to unnecessary and unspeakable degradation." "The effect of this … downpour [of evidence] … was to render appellant so despicable that his defense, which centered on his credibility, was eviscerated. Had such evidence not been admitted, the jury would have been presented with a true credibility decision, judging the testimony of the alleged victims … against appellant and his overall reputation in the community."

3. *Discussion*

Even assuming defendant properly objected to the computer evidence as irrelevant in the sense now asserted on appeal (which does not appear to be the case), it is frivolous to contend such evidence is not relevant.

Evidence is relevant if it has any tendency in reason to prove or disprove a material fact. (§ 210.) The evidence in this case tends to show intent and motive. An example might help: had the computers contained hundreds of pornographic pictures of little girls (or of adults, for that matter), and none at all of boys, that evidence clearly would be relevant to show that defendant did not commit sex crimes with boys. By the same token, the evidence actually presented in this case showed that defendant had an unnatural, exclusive interest in overweight boys of a certain age, exactly matching the description of the victims at the time of the molestations. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 912.) Accordingly, we reject defendant's argument that the evidence was not relevant.

Defendant's second level of argument on this point is that we should evaluate the computer evidence as a whole and that, in doing so, we should conclude the evidence was only admissible for limited purposes under section 1101, subdivision (b), and not for all purposes under section 1108. Then he argues that intent, a primary purpose for

admission of such evidence, was not in issue in this case. Such an approach, however, would misconstrue the record.

The primary evidence the prosecutor sought to introduce was evidence of other sexual offenses, admissible for any purpose under section 1108. Evidence that defendant possessed and transmitted unlawful child pornography and that he sent harmful matter with intent to seduce a minor (Pen. Code, § 288.2) was admissible under section 1108 to show defendant's propensity for sex with a certain type of child that matched the victims. However, the defense hotly contested ownership of the desktop computer on which virtually all of the child pornography was found and expressly denied that defendant placed the materials on the computer. Thus, an issue in the case was whether the unlawful materials were defendant's, that is, an issue of the identity of the user of the computer. The evidence not of sexual offenses--i.e., internet chat and browser history--was admissible under section 1101 to establish the identity of the person who placed on the computer the section 1108 materials--i.e., the internet materials constituting crime. Accordingly, defendant's approach to the evidence would have the tail wag the dog by focusing on -- and seeking to exclude -- the more collateral evidence on the basis that it sought to prove nothing relevant in the absence of the section 1108 materials. Instead, we hold that the section 1108 materials were admissible to show propensity, intent, and motive, and the remaining materials were admissible to show that defendant was the person who possessed the section 1108 materials.

Seeking refuge in section 352, defendant's final level of argument is that the sheer volume of computer evidence was prejudicial "overkill" that preempted the credibility of his denials of criminal conduct with the victims by turning defendant into a "monster." Initially, we conclude defendant waived this objection to the evidence. Defense counsel did not object to the overwhelming majority of the computer evidence, expressly stating that it might become cumulative at some point but that he had "no objection at this point." When counsel did object on the basis that further evidence would be cumulative,

the trial court, in essence, sustained the objection and strictly limited the prosecution's further introduction of such evidence.

Even if we were to address the issue on its merits, we would reject defendant's claim. On defendant's motion, the court strictly limited the number of pornographic images (five) the prosecution could introduce. While the volume of nonpornographic evidence thoroughly established, as defendant says, his preoccupation with "chubby young boys," the evidence itself was not graphic or particularly shocking. In other words, it is really the *result* about which defendant complains -- the clear establishment of his sexual propensities regarding young boys -- and not the nature of the evidence that established that result. And defendant's sexual propensity was highly probative. The evidence in question, even considered as a whole, was not so prejudicial as to outweigh the probative value of what the evidence established.

Further, the evidence was not admitted, as defendant contends, to establish he is a "pedophile," in the clinical sense of that term. While the prosecutor used the term in argument to the jury, such use was colloquial and the evidence in question here was not introduced for the purpose, or with the effect, of injecting into the case questions of pedophilia as a mental disorder.

Finally, defendant contends the evidence was wholly "unnecessary" and "lacked any probative value" in light of the direct evidence presented though each of the child victims. He says the only purpose of the evidence was "to turn [him] into a monster -- a[n] inordinately prejudicial effect." While we doubt the computer evidence did anything more than the victim testimony to inform the jury concerning the predatory nature of defendant's crimes, the real answer to defendant's claim is given on the following page of defendant's brief: Had the computer evidence of defendant's propensity for sex with and prurient interest in young boys been excluded, "the jury would have been presented with a true credibility decision, judging the testimony of the alleged victims in conjunction with the described acts juxtaposed against appellant and his overall

reputation in the community. This state of affairs would have provided appellant the vehicle for acquittal, raising the reasonable possibility that the jury would have acquitted appellant of at least some, if not all, of the alleged acts in light of his background, his claim of innocence and the inconsistent statements by some of the victims, the delays in reporting, and the improbability [*sic*] that some of the acts did not occur as described …."

To the extent defendant is correct, he clearly describes the probative value of the computer evidence. (See *People v. Falsetta, supra,* 21 Cal.4th at p. 911 [one reason for enactment of section 1108 was "to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility"].) For the reasons we have set forth above, that evidence was not unduly prejudicial as that term is used in section 352. (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

B. Instructional Error

Defendant contends the "extraordinary" circumstances of this case required the court, on its own motion, to instruct the jury with Judicial Council of California Criminal Jury Instructions (2006) CALCRIM No. 1191 (evidence of uncharged sex offense), concerning the jury's evaluation and use of evidence admitted for a limited purpose. Defendant recognizes that it is settled law that the court has no duty to instruct in this regard unless the defendant requests such an instruction. (See *People v. Smith* (2007) 40 Cal.4th 483, 516.) However, defendant relies on dicta in this court's decision in *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067 (*Willoughby*), to contend that the court was required to instruct with CALCRIM No. 1191. He also contends trial counsel was constitutionally ineffective in failing to request the instruction.

Willoughby has limited applicability after the enactment of section 1108 and the record suggests a clear tactical decision by counsel not to request the instruction.

Willoughby was decided in 1985. At that time, section 1101, subdivision (b) limited the admissibility of uncharged acts: such evidence was (and still is, except in sex

crime prosecutions) admissible only for the limited purpose of proving a fact in issue, such as intent or identity, other than the defendant's "disposition to commit such an act." Under those circumstances, and recognizing "the law's sensitivity to the admission of prior offenses in sex cases," this court stated that an instruction informing the jury of the limited purpose for the prior-act evidence was required where "evidence of past offenses play[s] such a dominant part in the case … that it would be highly prejudicial without a limiting instruction." (*Willoughby, supra,* 164 Cal.App.3d at p. 1067.)

Under section 1108, enacted in 1995, of course, evidence of uncharged sex crimes is admissible without the limitations contained in section 1101, subdivision (b) and, in particular, is admissible to prove a defendant's disposition to commit sex crimes. (*People v. Falsetta, supra,* 21 Cal.4th at p. 912.) Accordingly, *Willoughby*'s concern that the jury would misuse evidence of uncharged crimes is no longer applicable when the evidence is admitted under section 1108. The court was not required to instruct with CALCRIM No. 1191 in the present case.

Unlike the limiting instruction contemplated in *Willoughby*, CALCRIM No. 1191 tells the jury specifically that it can conclude from the uncharged-acts evidence "that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] [the offenses] charged here." (First bracketed material included in original; second bracketed material added.) It is clear that defense counsel did not want this point emphasized to the jury. His approach to the computer evidence was to denigrate the evidence as a whole on the basis it was more likely that defendant's teen-aged stepson was responsible for everything on the computer and thereby minimize the importance of the computer evidence. It is reasonable to conclude counsel did not want an instruction that emphasized the importance of this evidence. Defendant has not established such a tactical decision would have been unreasonable and that, as a consequence, counsel was

constitutionally ineffective in failing to request a limiting instruction. (See *Strickland v. Washington* (1984) 466 U.S. 668, 690.)

C. Cross-Examination

Defendant testified on his own behalf. His attorney asked him the following question: "I think we covered all the alleged victims. Is there any one ever, ever, other than Barbara P, that's accused you of anything, other than about nine years later [J.P.] coming forward, a year and-a-half [*sic*] or so [K.G.] coming forward, [N.E.] about a year and-a-half coming forward, and [E.W.] 13 to 15 years -- other than that, had anybody ever accused you of molestation touching or anything?" Defendant answered, "No sir." In response to further questioning, defendant reiterated that he hugged boys when he was around them and that he patted them on the buttocks as "kind of a sports thing, you know, way to go." Defendant then reiterated his denial of any improper touching of the victims; he stated twice that his testimony was the truth.

As it happens, defendant was in fact accused of improperly touching another boy, R.W., in 2001. On appeal, defendant contends the court prejudicially erred in allowing the prosecutor to cross-examine defendant about this earlier accusation. Totally misrepresenting the nature of the cross-examination and his answers to the prosecutor's questions, defendant contends that once he admitted "he had been investigated," impeachment of his credibility was complete and any further questioning concerning the specifics of the incident resulted in irrelevant, unduly prejudicial, and "highly suggestive" evidence.

When the prosecutor began questioning on the 2001 incident, defense counsel objected and there was a lengthy sidebar conference. The trial court made clear that the issue on cross-examination was the credibility of defendant's denial that he had ever previously been accused of other improper touching. The court ruled that if defendant admitted he had been accused in relation to the 2001 incident, further evidence regarding the incident would not be permitted.

Despite defendant's contention that he "admitted he had been investigated," the record tells a different story:

"Q [Prosecutor]: Isn't it true you were accused of inappropriate contact with a boy in a pool in 2001?

"A: I was not aware that I was ever accused. If I can elaborate, I was inquired made [*sic*] as to a situation in the pool, just crazy behavior, splashing, throwing each other, and that's what I was inquired about [*sic*].

"Q: And were you inquired [*sic*] by detective from the Fresno Police Department?

"A: I was called, yes."

All of the remaining cross-examination, the subject of defendant's contention on appeal, consisted of further questioning, using the police report to refresh defendant's recollection, to try to get to the truth of defendant's continued denial that he was accused of inappropriate touching. Defendant eventually acknowledged the telephone call had summoned him to the police department, where he was interviewed for 20 to 30 minutes. During the interview, he acknowledged that, as had been reported to the police, he had caused R.W., an overweight 13-year-old boy, to sit on his lap in the pool and had caused him to move around on his lap in a manner that a witness could construe as sexual activity.

This process required an examination that fills 17 pages of reporter's transcript. This process involved repeated denials by defendant that he remembered anything about the pool incident and the police interview, followed by repeated references to a police report, followed by repeated acknowledgment (sometimes in rather equivocal terms) that someone may have seen something that was possibly like what was discussed in the police report. Ultimately, defendant continued to minimize the incident as typical father-son type interaction and asserted that R.W.'s father had concluded the whole business was just a "misunderstanding."

Accordingly, we reject the factual premise of defendant's argument on appeal: on cross-examination, defendant first denied and never unequivocally admitted he had been investigated for inappropriate touching of R.W. Because defendant's argument is based entirely on this erroneous factual premise, we reject his contentions. The prosecutor was entitled to cross-examine defendant to impeach his credibility based on defendant's statements in the police report.

D. Rebuttal Evidence

Over defense objection, the prosecutor was permitted to present testimony from the witness, Gonzalez, who complained to the police about the incident with R.W. In addition, the prosecutor was permitted to present testimony from R.W.'s father, to the effect that he restricted his son's interaction with defendant after the 2001 pool incident. On appeal, defendant contends this rebuttal testimony was inadmissible and prejudicial. It was neither.

Defendant presented character evidence to the effect that he was an outgoing, physical person, who hugged, patted, and engaged in horseplay with young boys, but that he never, ever, inappropriately touched any boy. In addition to denying he was ever accused of inappropriate touching in the pool incident, he continued to characterize that touching as innocent horseplay. He testified the interaction was normal father-son play and the investigation was an invasion of his privacy.

Gonzalez testified that she saw R.W. sit on defendant's lap in the swimming pool and move forward and back on his lap. She overheard a suggestive conversation between the two. This testimony was relevant to defendant's claims that his physical interactions with young boys were innocent and merely reflective of his outgoing personality. He had described the pool incident as just another example of these innocent interactions. Gonzalez's testimony was relevant to establish that defendant's interactions were not innocent, as well as to impeach defendant's credibility. (See *People v. Jones* (2003) 30

Cal.4th 1084, 1121.) The testimony was short, relevant, and factual; it was not unduly prejudicial or time consuming. It was not error to permit the testimony of this witness.

Defendant also testified R.W.'s father had concluded, after discussing the matter with defendant, that the matter was just a "misunderstanding." The prosecutor called the father as a rebuttal witness. He testified that he decided not to pursue the matter of the pool incident based on the limited information he had at that time. He said he had not read the police report at the time that he decided merely to restrict defendant's access to R.W. This testimony was relevant to impeach defendant's testimony which, in net effect, asserted that the father agreed with defendant that the pool incident was merely horseplay, not child molestation. Again, the testimony was brief and factual; it was not unduly prejudicial or time consuming. The court did not err in permitting this testimony.

DISPOSITION

The judgment is affirmed.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

_____
LEVY, J.

_____
KANE, J.